

John Jay's Letter to the British

March 17, 1794

Gov. T. R. [illegible]

ON FRIDAY
STATE OF NEW YORK
JULY 17, 1794

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(L)

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 1057

MARGUERITE CAHN RAPHAEL, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 37-60) is reported in 45 B. T. A. 256 under the title of *Francois Lang v. Commissioner*. The opinion of the Circuit Court of Appeals (R. 90-102) is reported at 133 F. 2d 442.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 1, 1943 (R. 103). A petition for rehearing was denied March 15, 1943 (R. 104). Petition for a writ of certiorari was filed May 28, 1943. The jurisdiction of this Court is

invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Was taxpayer, a nonresident alien, taxable under Section 211 (a) (1) (A) of the Internal Revenue Code upon her share of the interest paid to her during the tax year pursuant to a judgment of a federal court?

STATUTE INVOLVED

Internal Revenue Code:

SEC. 119. INCOME FROM SOURCES WITHIN UNITED STATES.

(a) *Gross Income from Sources in United States.*—The following items of gross income shall be treated as income from sources within the United States:

(1) *Interest.*—Interest from the United States, any Territory, any political subdivision of a Territory, or the District of Columbia, and interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, * * *.

* * * * *

(U. S. C., Title 26, Sec. 119)

SEC. 211. TAX ON NONRESIDENT ALIEN INDIVIDUALS.

(a) *No United States Business or Office.*—

(1) *General Rule.*—

(A) *Imposition of Tax.*—There shall be levied, collected, and paid for each taxable year, in lieu of the tax imposed by sections

11 and 12, upon the amount received, by every nonresident alien individual not engaged in trade or business within the United States and not having an office or place of business therein, from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 10 per centum of such amount, except that such rate shall be reduced, in the case of a resident of a contiguous country, to such rate (not less than 5 per centum) as may be provided by treaty with such country.

* * * * *

(U. S. C., Title 26, Sec. 211.)

SEC. 212. GROSS INCOME.

(a) *General Rule.*—In the case of a nonresident alien, individual gross income includes only the gross income from sources within the United States.

* * * * *

(U. S. C., Title 26, Sec. 212.)

STATEMENT

The facts found by the Board (R. 38-60) may be summarized as follows:

During the tax years and prior years the taxpayer, and certain others, were nonresident alien individuals not engaged in trade or business within

the United States and not having an office or place of business in this country (R. 39). Before World War I they, or their predecessors in interest, held title as tenants in common to several thousand acres of land located in Kern County, California (R. 39). The Anglo California National Bank of San Francisco (hereinafter referred to as the bank) for several years had been the agent of the owners of the lands and had in its possession powers of attorney with respect to them. Herbert Fleishhacker was the president of the bank. In May of 1915 the bank, acting under the powers of attorney, caused 110 acres to be sold for \$33,000. This 110-acre parcel had a market value of \$260,000 at the time of sale. In March of 1917 the bank and Fleishhacker, acting under the powers of attorney, sold 40 additional acres of the land for \$13,500. This 40-acre tract had a market value of \$40,000 when it was sold. The owners consented to the sales upon fraudulent misrepresentations made to them by the bank and Fleischhacker. (R. 39-40.)

In 1933 taxpayer and her associates filed an action against Fleishhacker, the bank, and other named individuals and corporations in the United States District Court for the Southern District of California (R. 40). In this action the trial court found (R. 41):

By reason of the fraudulent acts and conduct of the Bank and Fleishhacker * * * with respect to the * * * sale of the

110 acres on or about May 24, 1915 [the plaintiffs were damaged] in the amount of \$227,000, representing the difference between the market value of said 110 acres of said date, \$260,000, and the sum of \$33,000 received therefor, together with interest on the said sum of \$227,000, from the date of said sale; and, with respect to the * * * sale of 40 acres on or about March 22, 1917, the said plaintiffs had been damaged in the amount of \$26,500, representing the difference between the market value of said 40 acres on said date, \$40,000, and the sum of \$13,500 received therefor, together with interest on the said sum of \$26,500 from the date of said sale in 1917.

The court concluded that the plaintiffs were (R. 41-42):

* * * entitled to judgment against [Fleishhacker and the Bank] in the sum of \$253,500, together with interest from May 24, 1915, to date of judgment at the rate of seven percent (7%) per annum on the sum of Two Hundred Twenty-Seven Thousand Dollars (\$227,000) plus interest at the same rate from March 26, 1917, to date of judgment on the sum of Twenty-six Thousand Five Hundred Dollars (\$26,500) and for their costs and disbursements in this action.

On January 11, 1938, judgment was entered in favor of plaintiffs and against the bank and Fleishhacker "in the sum of \$651,579.71" (to-

gether with costs (R. 42)), of which \$398,079.91 was computed as an amount equal to seven percent per annum on \$227,000 from May 24, 1915, to January 11, 1938, and seven percent per annum on \$26,500 from March 26, 1917, to January 11, 1938 (R. 29).

The bank and Fleishhacker appealed to the Circuit Court of Appeals for the Ninth Circuit, which on September 7, 1939, affirmed the judgment of the lower court.¹ A petition for certiorari was denied by this Court on January 2, 1940.² (R. 42). On January 19, 1940, the full amount of the judgment, together with interest thereon in the sum of \$92,644.93, or a total of \$743,925.60, exclusive of taxable costs, was paid in satisfaction of the judgment (R. 42).

Taxpayer filed with the Collector of Internal Revenue for the District of Maryland an income tax return for the fiscal year ended January 31, 1940, on the cash receipts and disbursements basis, reciting that she had received a $1\frac{7}{300}$ ths part of the total sum paid in satisfaction of the judgment, but asserting that no part of the sum received constituted taxable gain, profit, or income subject to taxation (R. 38-39). The Commissioner determined a deficiency against the taxpayer for the tax year by including as taxable in-

¹ The opinion is reported *sub nom. Anglo California Nat. Bank v. Lazard*, 106 F. 2d 693.

² 308 U. S. 624.

come her proportionate share, i. e., $17/300$ ths, of \$490,425.60, which represented all of the \$398,079.71 interest included in the judgment (save \$299.04) plus the \$92,644.93 paid as interest on the judgment (R. 12-13, 42, 92).

The Board of Tax Appeals held (R. 48-57) that the taxpayer was taxable upon her proportionate share of the \$92,644.93 but was not taxable upon her share of the \$398,079.71.³ The Circuit Court of Appeals held her taxable upon her proportionate share of the entire \$490,425.60 (R. 90-102). On her petition for certiorari the taxpayer seeks review of only that part of the decision of the Circuit Court of Appeals which held her taxable upon her proportionate part of the \$398,079.71 (Pet. 2).

ARGUMENT

The decision below is correct; it presents no conflict; and there is no occasion for further review.

It is plain that the \$398,079.71 included in the judgment of the District Court as interest (R. 41-42) was allowed by the District Court as compensation for the withholding of the money to which the petitioner and the other owners were entitled

³ By agreement, final decision was not entered by the Board of Tax Appeals in the companion cases of the other alien landowners. Entry of final decision in those cases has been held in abeyance pending final determination by the courts of the issues here presented.

for their lands.⁴ Cf. *Kieselbach v. Commissioner*, 317 U. S. 399. It depended "on time" (*Meilink v. Unemployment Comm'n*, 314 U. S. 564, 570), was calculated at the legal rate in California, was interest "in the common understanding" (*Old Colony R. Co., v. Commissioner*, 284 U. S. 552, 561), and hence was "interest" within the meaning of the term "interest" as used in the Revenue Acts (*Deputy v. du Pont*, 308 U. S. 488, 498; *United States v. Childs*, 266 U. S. 304, 308).

It is also obvious that the interest thus included in the judgment of the District Court and collected during the tax year was interest from sources within the United States, within the meaning of Section 119 (a) (1) of the Internal Revenue Code, *supra*, and therefore taxable to the nonresident aliens under Section 211 (a) (1) (A) of the Code, *supra*. This interest, paid by the Anglo California National Bank of San Francisco and by its president, Herbert Fleishhacker, with respect to fraudulent dealings in California property, was plainly "from sources within the United States" within the meaning of Section 211 (a) (1) (A).

This Court has already held (*Helvering v. Stockholms &c. Bank*, 293 U. S. 84, 86) that the

⁴ The Civil Code of California provides:

SEC. 1915. INTEREST, WHAT. Interest is the compensation allowed by law or fixed by the parties for the use, or forbearance, or detention of money.

SEC. 3288. IN ACTIONS OTHER THAN CONTRACT. In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury.

obligation of the United States to pay interest upon a refund of taxes is an "interest-bearing obligation" within the meaning of that statutory phrase. So also the obligation of the Anglo California Bank and of Fleishhacker to pay interest, pursuant to the judgment in favor of the owners, was an "interest-bearing obligation." It was a *judicially declared obligation*, and no less an interest-bearing obligation because judicially declared pursuant to provisions of a California Statute (Sec. 3288, Civil Code of California). The interest received on such obligation was therefore "interest on * * * interest-bearing obligations" of residents. *Helvering v. Stockholms &c. Bank, supra.*

Moreover, the \$398,079.71 also constituted "other fixed or determinable annual or periodical gains, profits, and income" within the meaning of Section 211 (a) (1) (A) of the Internal Revenue Code, and the Circuit Court of Appeals properly so held (R. 96). Taxpayer merely contends in this connection that the \$398,079.71 was not "annual or periodical" income (Br. 28). Admittedly taxpayer, who was on the cash basis (R. 28, 39), could not properly have reported her proportionate share of the \$398,079.71 for purposes of taxation until the successful conclusion of the litigation with the bank and Fleishhacker and the payment by them of the judgment against them. Thus taxpayer could not be charged with gains, profits, or income on account of her recovery from

her agents until her fiscal year ended January 31, 1940. *United States v. Safety Car Heating Co.*, 297 U. S. 88; *North American Oil v. Burnet*, 286 U. S. 417; *Doyle v. Commissioner*, 110 F. 2d 157 (C. C. A. 2d), certiorari denied, 311 U. S. 658. Nevertheless, the interest was "annual or periodical" in nature, even though paid all at one time. It was calculated at an annual rate (seven percent per annum) for a period of years. It merely could not be collected until January 1940. There is no similarity between interest so calculated for a period of more than twenty years and the occasional winnings of a nonresident alien at a horse race or the occasional prizes which a nonresident alien may win at an art exhibit, which the Bureau of Internal Revenue has informally ruled did not constitute "annual or periodical" income (Pet. 29-30).

CONCLUSION

The petition for certiorari should be denied.
Respectfully submitted.

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